

# The United Nations Declaration on the Rights of Indigenous Peoples, Treaties and the Right to Free, Prior and Informed Consent: A Framework for Restitution and Redress of Treaty Violations in the United States

Submission for the Consultation with Indigenous Nations, Peoples and Tribes in preparation for United Nations Human Rights Council's 2<sup>nd</sup> Universal Periodic Review of the United States  
University of Oklahoma College of Law, Norman, Oklahoma

April 24<sup>th</sup>, 2014

Presented by Andrea Carmen, International Indian Treaty Council

*“Treaties between sovereign nations explicitly entail agreements which represent ‘the supreme law of the land’ binding each party to an inviolate international relationship.”*

--- *“The Declaration of Continuing Independence of the Sovereign Native American Indian Nations,” June 1974, Standing Rock South Dakota, founding document of the IITC.*

... *“treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States*

--- *Preamble, United Nations Declaration on the Rights of Indigenous Peoples*

*“... I encourage States to take concrete steps to honour and strengthen the treaties they have concluded with indigenous peoples and to cooperate with them in implementing new agreements or other constructive arrangements through transparent, inclusive and participatory negotiations.”*

-- *H.E. Navi Pillay, United Nations High Commissioner on Human Rights, August 7, 2013*



## **I. TREATIES AND THE RIGHT TO FREE, PRIOR AND INFORMED CONSENT**

The US government entered into and ratified more than 400 treaties with Indian Nations from 1778 to 1871. These Treaties recognized and affirmed a broad range of rights and relationships. These include, among others, mutual recognition of sovereignty, peace and friendship, land and resource rights, rights to health, housing, education and subsistence rights (hunting, fishing and gathering). In some cases, such as the Treaty of Ruby Valley (1863), US Treaties with Indigenous Nations were limited to transit through Treaty lands for settlers. The full recognition and observance of Treaties is directly relevant to the protection of and jurisdiction over a number of Sacred Areas in the US, including many located off of currently recognized “Reservation” lands.

From the perspective of Indigenous Treaty Nations, the US has not fully upheld even one of its Treaties. These Treaties have been violated, abrogated or ignored. US interactions with the Indigenous Peoples were recognized as sovereign equals through the Treaty-making process. The Treaty relationship, based on mutual consent, continues to be legally binding further to the US Constitution, international law and the original understandings of Indigenous Nations. Treaties were and are an exercise and validation of the inherent rights of Indigenous Peoples to self-determination as well as being sacred pacts between sovereign Nations. Special Rapporteur James Anaya recognized, in his report on his 2012 country visit to the US, the sacred nature and standing of the Treaties concluded with the US as understood by the Indigenous Nation Treaty Parties.

Even though the US Congress unilaterally ended Treaty-making with Indian Nations in 1871, the preexisting Treaties are still in effect and contain obligations which are legally binding upon the US today. Article Six of the US Constitution references Treaties as part of “the Supreme Law of the Land;”<sup>1</sup> this includes and encompasses US obligations undertaken in accordance with Treaties entered into in good faith with the original Indigenous Nations of the land now known as the United States. Nevertheless, the US has continued to assert sole jurisdiction to determine, decide and control the process for redress of Treaty violations or to unilaterally abrogate legally binding Treaties based on the “plenary power of Congress.”

For Indigenous Peoples, the Right of Free, Prior and Informed Consent (FPIC) is a requirement, prerequisite and manifestation of the exercise of their fundamental right to self-determination as defined in international law. FPIC is a fundamental underpinning of Indigenous Peoples’ ability to conclude and implement valid Treaties and Agreements with other parties, to exert sovereignty over their lands and natural resources, to develop and participate in processes that redress and correct violations, to accept any results that emerge from these processes, and to establish the terms and criteria for negotiations with States over any and all matters affecting them.

Experts at the First United Nations Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples (2003), stressed the vital importance of consent in paragraph 2 of their final conclusions and recommendations:

---

<sup>1</sup> Article 6, clause two reads as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Treaties, agreements and other constructive arrangements constitute a means or the promotion of harmonious, just and more positive relations between States and Indigenous peoples because of their **consensual basis** and because they provide mutual benefit to Indigenous and non-Indigenous peoples.<sup>2</sup>*

This consensual basis of Treaties and Agreements is an essential component upon which their original validity and ongoing viability is based. Consent and mutual agreement applies to processes for concluding, implementing, and interpreting Treaties, making changes or amendments to their original provisions and determining effective, just and participatory mechanisms for redress, dispute resolution and restitution in the case of violations.

This consensual basis of Treaties and Agreements is an essential component upon which their original validity and ongoing viability is based. The failure of the United States (US) to fully accept the rights to Self-determination and FPIC of Indigenous Nations as stated in the United Nations (UN) Declaration on the Rights of Indigenous Peoples constitutes another example of the Treaty violations and abrogations which have characterized its history in relation to the sovereign Indigenous Nations of this land. Treaties, by definition, can be concluded only between two equally sovereign Nations. The continuing legal validity of the Treaties concluded by the settler government of the US with the Indigenous Nations of this land reaffirms the ongoing nature of the Treaty relationship based on equal standing and rights, mutual recognition and respect.

Treaties entered into by mutual consent continue to be legally binding as per the US Constitution, International Law and the sacred original understandings of Indigenous Nations. Their existence is a reaffirmation, exercise and validation of the inherent rights to self-determination of which consent is an essential component.

In fact, consent is a fundamental Treaty Principle which predates any UN Standard. It is a foundation of the original relationship between the US and Indian Treaty Nations. For example, the Ft. Laramie Treaty concluded on April 29<sup>th</sup>, 1869 with the “Great Sioux Nation”<sup>3</sup> states in Article 16:

*“The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or **without the consent of the Indians first had and obtained**, to pass through the same;”*

These terms also apply to any consensual changes in the terms, interpretations or implementation of the original Treaty provisions, as they were understood by the Indigenous Peoples when they were agreed to in the first place.

---

<sup>2</sup> Conclusions and Recommendations of the Seminar on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Peoples, held in Geneva from 15 to 17 December 2003. E/CN.4/2004/111, paragraph 3.

<sup>3</sup> “TREATY WITH THE SIOUX -- BRULÉ, OGLALA, MINICONJOU, YANKTONAI, HUNKPAPA, BLACKFEET, CUTHEAD, TWO KETTLE, SANS ARCS, AND SANTEE-- AND ARAPAHO 15 Stat., 635. Ratified, Feb. 16, 1869. Proclaimed, Feb. 24, 1869

Today, the US continues to make unilateral decisions to extract resources (gold, uranium, coal, timber, water, etc.), and to carry out development projects on Treaty lands, as evidenced in the submissions on specific issues by Indigenous Treaty Nations with devastating impacts on the Sacred Areas where were legally recognized as under the jurisdiction of the Indigenous Treaty Parties under the terms of these Treaties.

A current example of the ongoing violation of Treaty Rights is the proposed Keystone XL Pipeline. On September 19, 2008, TransCanada Keystone Pipeline, LP1 (“TransCanada”)<sup>4</sup> filed an application for a Presidential Permit with the U.S. Department of State (“DOS”) to build and operate the Keystone XL Pipeline to bring crude oil produced in Northern Alberta Canada (the so called “tar sands” project) to the Gulf of Mexico for processing and transport. At that time, the proposed Keystone XL pipeline included both the northern segment from Canada to Nebraska and the southern segment from Oklahoma to Texas. The proposed route would run through the middle of the US over the Oglala Aquifer and through the Treaty and traditional lands of a number of Indigenous Nations. However, to date, no process for consent in accordance with the provisions of the UN Declaration, the 1868 Ft. Laramie Treaty or Treaties with other Indigenous Treaty Nations who would be impacted along the proposed route has been proposed or put in place by the US.

From September 15 -16, 2011 Tribal Governments, Traditional Treaty Councils, Indigenous organizations and First Nation Chiefs from Canada held a “Tribal Emergency Summit” on the Rosebud Sioux Reservation in South Dakota, USA to discuss the potential impacts of TransCanada’s proposed Keystone XL pipeline. They adopted the “Mother Earth Accord,” which expressed a number of concerns including that ***“construction of the Keystone XL pipeline will impact sacred sites and ancestral burial grounds, and treaty rights throughout traditional territories, without adequate consultation on these impacts.”*** The Accord, which has been signed by over 70 Tribal and First Nation Governments, Treaty Councils and Indigenous organizations to date, concluded with an urgent collective request: ***“We urge President Obama and Secretary of State Clinton to reject the Presidential Permit for the Keystone XL pipeline.”***

The National Congress of American Indians, representing over 400 Tribal Nations in the US adopted a consensus resolution at their midyear conference in June 2011 entitled ***“Opposition to Construction of the Keystone XL Pipeline and Urging the U.S. to Reduce Reliance on Oil from Tar Sands and Instead, to Work towards Cleaner, Sustainable Energy Solutions.”***

## **II. THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AND THE RIGHT TO FREE, PRIOR AND INFORMED CONSENT**

The adoption of the **UN Declaration on the Rights of Indigenous Peoples** (The “UN Declaration”) by the UN General Assembly on September 13<sup>th</sup>, 2007, represented a historic step forward for Indigenous Peoples. Its numerous provisions affirming the right to FPIC for Indigenous Peoples provides a now-internationally accepted framework for the implementation. These include a just and participatory framework for redress, restitution, settlement, repatriation and dispute resolution affecting lands and resources, subsistence, environment and cultural heritage among others.

---

<sup>4</sup> TransCanada Keystone Pipeline, LP is a subsidiary of the Canadian company TransCanada Corporation.

With the Adoption of the UN Declaration on the Rights of Indigenous Peoples, as well as other international standards such as General Recommendation XXIII of the UN Committee on the Elimination of Racial Discrimination (CERD), the 2005 UN General Assembly's Plan of Action for the 2<sup>nd</sup> International Decade of the Worlds' Indigenous Peoples, FPIC is now an undeniable operative human rights framework. It contains the minimum standards for negotiating and concluding any new Treaties and agreements, as well as for negotiations between Indigenous Peoples and States pertaining to the implementation of exiting Treaties, Agreements and Constructive Arrangements. FPIC is affirmed as the operative principle through which the parties establish, in equal and full partnership, the terms, processes, mechanisms and criteria for settling disputes arising from the failure to implement and respect existing Treaties.

Many of the relevant provisions of the UN Declaration directly refer to FPIC in relation to rights affirmed in Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples as well as other rights. For example, Article 19, addressing the adoption of legislative and administrative measures and Article 32, which addresses development activities affecting Indigenous Peoples lands and natural resources, contain some of the broadest affirmations in the UN Declaration of the right to FPIC for Indigenous Peoples. Article 10, which affirms that Indigenous Peoples shall not be forcibly removed or relocated from their lands or territories without their FPIC, is also of direct relevance to land as the central issue in most Treaty rights violations being carried out around the world.

These provisions, as well as others in the UN Declaration affirm the fundamental nature of the relationship between State and Indigenous parties also enshrined and recognized in Treaties. They also highlight some of the most critical ways that Treaty Rights as well as the related right to FPIC are systematically violated, not only historically but in the present day.

### **III. US QUALIFIED SUPPORT FOR THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AND RESULTING SHORTFALLS IN ITS IMPLEMENTATION**

On December 16, 2010, President Barack Obama announced that the US would become the last of the four countries which originally voted against the Declaration on September 13, 2007 at the UN General Assembly to change its position and “lend its support” to the Declaration. This decision was keeping with the near-universal calls by Indigenous Peoples, Tribes and Nations in and outside the US, as well with a number of recommendations in the UN Human Rights Council's First Universal Periodic Review of the US. The initial positive response by many Indigenous Peoples to this announcement was hampered by significant qualifications contained in the US State Department's written text, entitled “Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples.”<sup>5</sup> The US qualifications and limitations placed on the application of internationally-recognized “minimum standard” rights directly impact Indigenous Nations' and Peoples' full enjoyment of the rights in the UN Declaration as well as those affirmed in legally binding International Instruments to which the US is a State party.

These include, in particular:

---

<sup>5</sup> US Dep't of State Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples (December 10, 2010), available at <http://www.state.gov/documents/organization/153223.pdf>. This was not distributed until after the President's announcement.

## **1) Limiting Free, Prior and Informed Consent to “Consultation”**

A major concern expressed in the written statement issued by the US State Department dated December 10<sup>th</sup>, 2010, was its redefinition of the right to Free Prior and Informed Consent, affirmed in many articles of the UN Declaration as a much-diminished “process of consultation with tribal leaders which does not require, in the US view “the agreement of those leaders, before the actions addressed in those consultations are taken.”<sup>6</sup>

The Consolidated Indigenous Peoples Alternative Report was submitted to the UN Human Rights Committee on September 13<sup>th</sup> 2013 by IITC with 28 co-submitters and contributors consisting of Traditional and Tribal governments, organizations, Treaty Councils, Indigenous Peoples organizations and traditional societies.<sup>7</sup> It cites the Navajo Nation Human Rights Commission report to the same body. Representing the federally recognized Navajo Nation, the NNHC addressed the shortfalls of “consultation” as defined in the US Announcement of Support for the UN Declaration, as well as in Executive Order 13007 and Executive Order 13175 referenced in the questions to the US by the Committee:

*“The Commission has asked not only the Forest Service and Indian Affairs, but the United States government, to abandon the terminology of “consultation” and replace it with the Declaration’s standard of “free, prior and informed consent.” The Commission agrees and understands that communication is important in strengthening the government-to-government relationships to protect sacred sites, circumvent the relocation of Navajos, and the development and use of the lands, territories and resources, but the terminology “consultation” limits the Navajo Nation and its people... because the current consultation policy mandated by Executive Orders 13007 and 13175 does not provide for consent. Providing the Navajo Nation and Navajo people with information about a proposed decision and gathering and taking into account their points of view is not sufficient in the context of their sacred places, forced relocation, and the development and use of lands, territories and resources.”<sup>8</sup>*

## **2) A “Different” Right of Self-Determination**

The US also stipulated that it does not recognize the full right of Self-determination, as recognized in ICCPR for **all** Peoples for Indigenous Peoples, but instead will recognize “a new and distinct international concept of self-determination specific to Indigenous peoples... which is “different from the existing right of self-determination in international law.”<sup>9</sup> This position contradicts the US Treaty relationship with Indigenous Nations and the principles of international law which affirm non-discrimination as well as a definition of Self-Determination for Indigenous Peoples in UN Declaration Article 3 consistent with Article 1 of ICCPR.

---

<sup>6</sup> Ibid, page 5

<sup>7</sup> The Indigenous Peoples’ Consolidated Alternative Report to the UN Human Rights Committee can be downloaded from the Human Rights Committee web site: <http://www2.ohchr.org/english/bodies/hrc/>. The Indigenous Peoples’ Consolidated Alternative Report is also available on IITC’s web site: [www.treatycouncil.org](http://www.treatycouncil.org).

<sup>8</sup> Navajo Nation Human Rights Commission “2013 Shadow Report to the UN Human Rights Committee regarding the US 4<sup>th</sup> periodic report to the UN Human Rights Committee as it related to Indigenous Peoples Sacred Areas and Free Prior and Informed Consent,” pages 6 -7.

<sup>9</sup> US Dep’t of State Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples (December 10, 2010), page 3.

The US has continued to reassert this discriminatory position in international bodies. For example on May 22, 2013, at the 12<sup>th</sup> session of the UN Permanent Forum on Indigenous Issues, US State Department representative Laurie Shestack Phipps, Advisor for economic and social affairs of the United States Mission to the United Nations, in a statement regarding the US position on the UN Declaration, referred to the UN Declaration as “a non-binding, aspirational document.” This US statement also “reiterate[d] the U.S. government’s view that self-determination, as expressed in the Declaration, is different from self-determination in international law.”<sup>10</sup>

In response to the US statement at the Permanent Forum, IITC and a number of other Indigenous delegations took the floor<sup>11</sup> to object to this discriminatory statement seeking to limit the internationally recognized right of Self Determination in the Covenants for ALL Peoples to exclude Indigenous Peoples.

### **3) *Limiting Implementation to “Federally Recognized Tribes”***

Another notable and highly problematic qualification in the “Announcement of US Support” was the intent to implement the UN Declaration’s provisions only for “federally recognized tribes.” Professor Margo Tamez, Lipan Apache, states that “Although numbers vary from one reporting unit to another, on the average, there are between 200-300 unrecognized historical Indigenous nations living in political juridical limbo in the U.S.”<sup>12</sup>

This failure of recognition, based in many cases on its own policies of Tribal termination, constitutes extinguishment. It denies access to services guaranteed under Treaties (i.e. health and education) and US federal laws, for example for return of Indigenous Peoples’ ancestral remains and cultural items, as well as land rights and identity. This applies in many cases even to Indigenous Nations which have concluded ratified Treaties with the United States.

Unrecognized Indigenous Peoples of U.S. territories, such as the Taíno of Puerto Rico, are further marginalized within the international system as their “home countries” are not full members of the United Nations or the Organization of American States. Submissions in this Report from the United Confederacy of Taíno People (Boriken/Puerto Rico) and the Lipan Apache (US/Texas border) provide informative explanations of the inability of many “unrecognized” Indigenous Peoples to protect their cultural heritage and Sacred Areas, or access even the minimal safeguards provided by laws such as the Native American Graves Protection and Repatriation Act (NAGPRA).<sup>13</sup>

## **IV. THE UN DECLARATION’S RIGHTS AFFIRMED IN UN HUMAN RIGHTS LAW**

The significance the UN Declaration’s full and unqualified recognition of Indigenous Peoples as Peoples for the first time in an international standard has far-reaching implications. This leaves no

---

<sup>10</sup> Link to the State Department’s statement: <http://usun.state.gov/briefing/statements/209946.htm>

<sup>11</sup> Link to IITC’s Intervention: <http://www.iitc.org/iitc-speaks-out-at-the-unpffi-6th-session-in-response-to-us-statement-attempting-to-limit-the-right-of-self-determination-for-Indigenous-peoples-2/>

<sup>12</sup> Margo Tamez, spokesperson and co-founder, Lipan Apache Women Defense, and professor of Indigenous Studies, University of British Columbia

<sup>13</sup> The Committee has previously expressed concern over the hundreds of Tribes that were terminated under the US Dawes Act, and later, from 1953 to 1968, under the Termination Policy of the Congress. Many of these continue to seek recognition and have their status, lands and rights restored.

room for doubt that the range of other instruments which are legally binding upon the United States and contain rights which accrue to all Peoples, also apply to Indigenous Peoples. Primary among those is the Right to Self-determination as stated in the three paragraphs which constitute Article 1 in Common of the International Human Rights Covenants, as well as the recommendations of the CERD, in particular General Recommendation XXIII pertaining to the implementation of the ICERD regarding the rights of Indigenous Peoples, including FPIC.

The US, in its ratification of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and other international Human Rights Treaties, has given its word that it will treat those within its jurisdiction in a manner consistent with the provisions of internationally recognized human rights, and to work within the UN to ensure that other States Parties act as well in accordance to those same provisions. Failure by the US to comply with Treaty body recommendations undermines a core commitment required by the Charter of the UN of all Member States, “to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion,” by pledging “to take joint and separate action in co-operation with the [UN] Organization for the achievement of the purposes set forth in Article 55.<sup>14</sup>

In this regard the International Indian Treaty Council is particularly interested in any responses which can be provided to the Rapporteur by the US regarding steps towards implementation of the Concluding Observations of the CERD in its 2008 review of the US, especially the recommendations in paragraphs 19 and 29 as follows:

19. While noting the explanations provided by the State party with regard to the situation of the Western Shoshone indigenous peoples, considered by the Committee under its early warning and urgent action procedure, the Committee strongly regrets that the State party has not followed up on the recommendations contained in paragraphs 8 to 10 of its decision 1(68) of 2006 (CERD/C/USA/DEC/1) (Article 5).<sup>15</sup>

**The Committee reiterates its Decision 1 (68) in its entirety, and urges the State party to implement all the recommendations contained therein.**

29. The Committee is concerned about reports relating to activities – such as nuclear testing, toxic and dangerous waste storage, mining or logging – carried out or planned in areas of spiritual and cultural significance to Native Americans, and about the negative impact that such activities allegedly have on the enjoyment by the affected indigenous peoples of their rights under the Convention. (Articles 5 (d) (v), 5 (e) (iv) and 5 (e) (vi)).

**The Committee recommends that the State party take all appropriate measures – in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedures – to ensure that activities carried out in areas of spiritual and cultural significance to Native Americans do**

---

<sup>14</sup> United Nations Charter, Articles 55 and 56.

<sup>15</sup> Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, 77th Sess., UN Doc. CERD/C/USA/CO/6 (2008) para. 19.

**not have a negative impact on the enjoyment of their rights under the Convention.**

**The Committee further recommends that the State party recognise the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans. While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to interpret the State party's obligations under the Convention relating to indigenous peoples.<sup>16</sup>**

The far-reaching implications of these recommendations addressing the United States' obligations under the Convention cannot be minimized. The CERD recommendations do not authorize the US to make its own interpretations of such internationally-adopted human rights provisions, or to attempt to unilaterally diminish or limit the rights recognized in the UN Declaration based on its own federal laws and policies which fail to live up to this now universally-recognized "minimum standard" commendation to the US underscores the Right of Indigenous Peoples to participate in decisions affecting them. According to the CERD and a number of other experts, including Indigenous experts, the UN Declaration on the Rights of Indigenous Peoples is applicable to all UN Member States, even the four (including the US) which originally voted against it or those, like the US, which have attempted to qualify it to perpetuate a relationship based on inequality and colonial domination.

We underscore that the CERD recommended that the Declaration be used as a "guide to interpret the State Party's (i.e. the US') obligations under the Convention" notwithstanding the State's position vis a vis the Declaration. This ties the Declaration and the implementation of its provisions *as they are written* directly to the US' obligations for implementing the ICERD, a legally-binding UN instrument.

## **V. MOVING BEYOND THE FAILED MODELS OF THE PAST**

The Land Claims Commission established by the US government in 1946 (and disbanded in 1978) was a failed process for Treaty abrogation "settlements" in violation of the FPIC of Indigenous Treaty Nations. It was established by the US government as a unilateral decision-making process by which the same party which had violated Treaty Rights was also the sole arbitrator of the resulting claims. This had disastrous impacts for Indigenous Treaty Nations in the US, whose rights were doubly violated by this process.

The desire of government and private interests to access Indigenous Peoples' lands for mineral development has been a primary force behind the illegal acquisition and appropriation of many of the Treaty Lands in the US and elsewhere. One of many examples was the US response to the

---

<sup>16</sup> Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, 77th Sess., UN Doc. CERD/C/USA/CO/6 (2008) at para. 29.

discovery of gold in the sacred Black Hills only 6 years after they were recognized by the 1868 Fort Laramie Treaty between the US and Sioux Nation as belonging to the Lakota (Sioux) in perpetuity.

The Black Hills (He' Sapa) are the sacred place of Creation for the Lakota. The protection of the Black Hills is an ancient, inherent and sacred responsibility for the Lakota, and was the central component of the Treaty the Lakota Nation made with the US settler government in 1868. The Black Hills means as much to the Lakota as the Vatican means to Roman Catholics or Jerusalem means to Christians, Muslims and Jews.

In 1980, the US Supreme Court stated, referring to the illegal confiscation of the Treaty Lands in the Black Hills of South Dakota that "... a more ripe and rank case of dishonorable dealing will never, in all probability, be found in the history of our nation" and considered that "...President Ulysses S. Grant was guilty of duplicity in breaching the Government's treaty obligations with the Sioux relative to ... the Nation's 1868 Fort Laramie Treaty commitments to the Sioux". The Court also concluded that the US Government was guilty of "... a pattern of duress ... in starving the Sioux to get them to agree to the sale of the Black Hills." <sup>17</sup>

Despite this clear acknowledgement of wrongdoing by the US Supreme Court over 30 years ago, to this day none of these illegally-confiscated Treaty Lands have been returned, and gold mining continues in the Black Hills.

In these and other proceedings affecting Treaty rights, the US Treaty party has continued to assert that they have sole jurisdiction to determine, decide and control the process for redress of Treaty violations or to unilaterally abrogate legally binding Treaties based on the "plenary power of congress." They have established the procedures and criteria for claims, determined if any violations have occurred and set the terms and parameters for compensation (which seldom if ever returned appropriated lands and resources) when and if Treaty the violations are recognized by the violating party. They continue to make unilateral decisions to extract resources (gold, uranium, coal, timber, water, etc.), and to carry out development projects (i.e. the Keystone XL Pipeline and a number of current mining plans) on Treaty lands.

This denial of due process has been addressed by the CERD. In its 2006 recommendations to the US in response to a submission under the Early Warning and Urgent Action Procedure<sup>18</sup> by the Western Shoshone National Council et. al., stated that the Indian Claims Commission processes had denied due process and did not comply with contemporary human rights norms, principles and standards. The CERD expressed concerns regarding the US assertion that the Western Shoshone lands had been rightfully and validly appropriated as a result of "gradual encroachment" and that the offer to provide monetary compensation to the Western Shoshone, although never accepted, constituted a final settlement of their claims.<sup>19</sup>

---

<sup>17</sup> *United States v. Sioux Nation*, 207 Ct. Cl. 234 at 241, 518 F.2d 1298 at 1302 (1975), cited in *United States v. Sioux Nation of Indians*, 448 U.S. 371 at 388 (1980).

<sup>18</sup> CERD/C/USA/DEC/1 11 April 2006

<sup>19</sup> "The Committee is concerned by the State party's position that Western Shoshone peoples' legal rights to ancestral lands have been extinguished through gradual encroachment, notwithstanding the fact that the Western Shoshone peoples have reportedly continued to use and occupy the lands and their natural resources in accordance with their traditional land tenure patterns. The Committee further notes with concern that the State party's position is made on the basis of processes

The right to FPIC of the concerned Indigenous Treaty Party is not a factor in these procedures and decisions. A just, fair process in the US to address, adjudicate and correct these and other Treaty violations with the full participation and agreement of *all* Treaty Parties has never, to date, been established.

Given the content of the UN Declaration's relevant provisions constituting the minimum standard, combined with the wide range of international norms and standards recognizing the right to FPIC for Indigenous Peoples, this situation can no longer be considered an acceptable status quo in the US. The call upon States and Indigenous Peoples to work together to change the terms, nature and structure of such processes so that they conform to current International Human Rights standards is clear and compelling.

**Of particular importance are the specific provisions in the UN Declaration (Articles and preambular paragraphs) recognizing the international character and standing of Treaties and States' obligation to and the related right to self Determination as defined under international (not "domestic") law, and the many articles which directly address and affirm the right to FPIC.**

The significance of these provisions and the rights and obligations for States which they affirm, cannot be minimized. They provide a clear basis for the next steps forward.

## **VI. THE UN DECLARATION AS A FRAMEWORK FOR REDRESS OF TREATY AND LAND RIGHTS VIOLATIONS**

The US statement of support for the UN Declaration on December 10<sup>th</sup>, 2010 presents an historic opportunity to bring procedures and mechanisms for redress and restitution of Treaty violations into line with currently accepted International Human Rights standards, based on the provisions of the Declaration that now been accepted and adopted by the all UN member States (with a only small number of States still abstaining).

A key provision in the preamble affirms the spirit of partnership and mutual consent which is not only the foundation of the Treaty relationship. It can also be the basis for the development of bilateral mechanisms for redress and dispute resolution between the Treaty Parties.

Key elements of this new bi-lateral mechanism for Treaty-related redress/restitution/conflict resolution/land rights adjudication and recognition, based on framework provided by the UN Declaration, would include:

- The process be fair independent, impartial, open and transparent (Article 27)
- It be established and implemented in conjunction with the indigenous peoples concerned (Article 27)

---

before the Indian Claims Commission, "which did not comply with contemporary international human rights norms, principles and standards that govern determination of indigenous property interests", as stressed by the Inter-American Commission on Human Rights in the case *Mary and Carrie Dann versus United States* (Case 11.140, 27 December 2002)". Ibid para 6.

- It gives due recognition to indigenous peoples' laws, traditions, customs and land tenure systems (Article 27); and/or gives due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights (Article 40)
- It provides redress for Indigenous Peoples' lands, territories and resources, including those which were traditionally owned or otherwise occupied or used and which were confiscated, taken, occupied, used or damaged without their free, prior and informed consent (Articles 27 and 28)
- Indigenous peoples shall have the right to participate in this process (Article 27)
- Redress can include restitution of their traditionally owned or otherwise occupied or used lands and resources unless this is not possible (Article 28)
- Compensation shall be just, fair and equitable (Article 28)
- If return of original lands (as per #6 above) is "not possible", compensation shall take the form of lands, territories and resources equal in quality, size and legal status, unless otherwise freely agreed to by the peoples concerned (Article 28)
- Monetary compensation or other appropriate redress can also be provided according to the above criteria, but only with the free agreement of the affected Peoples (Article 28)
- Indigenous peoples have the right to have access to the process (Article 40)
- The process provides for prompt decisions (Article 40)
- It provides just and fair procedures to Indigenous Peoples for the resolution of conflicts and disputes with States or other parties (Article 40)
- The process shall provide effective remedies for all infringements of their individual and collective rights (Article 40)

The basis for all processes and decisions in which Treaties and Treaty rights are involved or affected must be Article 37 of the UN Declaration which affirms Indigenous Peoples' unequivocal rights to the recognition, observance and enforcement of the Treaties, Agreements and Other Constructive Arrangements concluded with States or their successors, as well as the obligation of States to honour and respect such Treaties, Agreements and other Constructive Arrangements:

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

## **VII. RELEVANT RECOMMENDATIONS BY UN AND REGIONAL BODIES AND MECHANISMS SINCE THE 2010 UPR OF THE UNITED STATES**

**A. In response to submissions by Indigenous Peoples as well as US Government agencies and representatives during his country visit to the United States in April-May 2012, UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya submitted a report to the 21<sup>st</sup> session of United Nations Human Rights Council titled "The situation of indigenous peoples in the United States of America" [A/HRC/21/47/Add.1, 30 August 2012]. It contained the following observations, conclusions and recommendations which are directly relevant to achieving the full and effective implementation of the US UPR recommendations currently**

**under discussion:**

### **III. The disadvantaged conditions of indigenous peoples: The present day legacies of historical wrongs, C. Lands, resources and broken treaties**

38. Many Indian nations conveyed land to the United States or its colonial predecessors by treaty, but almost invariably under coercion following warfare or threat thereof, and in exchange usually for little more than promises of government assistance and protection that usually proved illusory or worse. In other cases, lands were simply taken by force or fraud. In many instances treaty provisions that guaranteed reserved rights to tribes over lands or resources were broken by the United States, under pressure to acquire land for non-indigenous interests. It is a testament to the goodwill of Indian nations that they have uniformly insisted on observance of the treaties, even regarding them as sacred compacts, rather than challenge their terms as inequitable.

41. In addition to millions of acres of lands lost, often in violation of treaties, a history of inadequately controlled extractive and other activities within or near remaining indigenous lands, including nuclear weapons testing and uranium mining in the western United States, has resulted in widespread environmental harm, and has caused serious and continued health problems among Native Americans. During his visit, the Special Rapporteur also heard concerns about several currently proposed projects that could potentially cause environmental harm to indigenous habitats, including the Keystone XL pipeline and the Pebble Mine project in Alaska's Bristol Bay watershed. By all accounts the Pebble Mine would seriously threaten the sockeye salmon fisheries in the area if developed according to current plans.

### **V. The significance of the Declaration on the Rights of Indigenous Peoples**

81. By its very nature, the Declaration on the Rights of Indigenous Peoples is not legally binding, but it is nonetheless an extension of the commitment assumed by United Nations Member States – including the United States – to promote and respect human rights under the United Nations Charter, customary international law, and multilateral human rights treaties to which the United States is a Party, including the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination.

84. As part of United States domestic and foreign policy, an extension of its international human right commitments, and reflecting a commitment to indigenous peoples in the United States, the Declaration should now serve as a beacon for executive, legislative and judicial decision-makers in relation to issues concerning the indigenous peoples of the country. All such decision-making should incorporate awareness and close consideration of the Declaration's terms. Moreover, the Declaration is an instrument that should motivate and guide steps toward still-needed reconciliation with the country's indigenous peoples, on just terms.

### **VI. Conclusions and recommendations**

#### **The need to build on good practices and advance toward reconciliation**

**90. Measures of reconciliation and redress should include, inter alia, initiatives to address outstanding claims of treaty violations or non-consensual takings of traditional lands to which indigenous peoples retain cultural or economic attachment, and to restore or secure indigenous peoples' capacities to maintain connections with places and sites of cultural or religious significance, in accordance with the United States international human rights commitments. In this regard, the return of Blue Lake to Taos Pueblo, the restoration of land to the Timbisha Shoshone, the establishment of the Oglala Sioux Tribal Park, and current initiatives of the National Park Service and the United States Forest Service to protect sacred sites, constitute important precedents or moves in this direction**

#### **The federal judiciary**

**105. Accordingly, the federal courts should interpret, or reinterpret, relevant doctrine, treaties and statutes in light of the Declaration, both in regard to the nature of indigenous peoples' rights and the nature of federal power.**

**B. On March 27<sup>th</sup>, 2014 the United Nations Human Rights Committee issued its Advance Concluding Observations on its review of the Forth report of United States regarding its compliance with its legally binding obligations as a State party to the International Covenant on Civil and Political Rights. It contained the following recommendations which are also directly relevant to the US implementation of the UPR recommendations under current discussion:**

#### **C. Principal matters of concern and recommendations**

##### **Applicability of the Covenant at national level**

**The State party should:**

**4. (d) Strengthen and expand existing mechanisms mandated to monitor the implementation of human rights at federal, state, local and tribal levels, provide them with adequate human and financial resources or consider establishing an independent national human rights institution, in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles) (General Assembly resolution 48/134).**

25. The Committee is concerned about the insufficient measures being taken to protect the sacred areas of indigenous peoples against desecration, contamination and destruction as a result of urbanization, extractive industries, industrial development, tourism and toxic contamination. It is also concerned about restricted access of indigenous people to sacred areas essential for preservation of their religious, cultural and spiritual practices and the insufficiency of consultation conducted with indigenous peoples on matters of interest to their communities (art. 27).

**The State party should adopt measures to effectively protect sacred areas of indigenous peoples against desecration, contamination and destruction and ensure that consultations are held with the communities that might be adversely affected by State party's development projects and exploitation of natural**

**resources with a view to obtaining their free, prior and informed consent for the potential project activities.**

**C. On April 20<sup>th</sup>, 2012, Article 37 of the UN Declaration was reaffirmed, expanded and further strengthened by the adoption of Article XXIII of the proposed America Declaration on the Rights of Indigenous Peoples. The American Declaration will be applicable in the 35 member States of the Organization of American States, including the US, Article XXIII as adopted includes all of the language in Article 37 of the UN Declaration on the Rights of Indigenous Peoples. It also adds the right to international redress for violations “When disputes cannot be resolved between the parties” and calls for implementation “in accordance with their true spirit and intent” and consideration for the understanding of Treaties by Indigenous Peoples. The full text is as follows:**

Article XXIII, Treaties, agreements and other constructive arrangements

1. Indigenous peoples have the right to the recognition, observance, and enforcement of the treaties, agreements and other constructive arrangements concluded with states and their successors in accordance with their true spirit and intent, in good faith, and to have the same be respected and honored by the States. States shall give due consideration to the understanding of the Indigenous Peoples in regards to treaties, agreements and other constructive arrangements. When disputes cannot be resolved between the parties in relation to such treaties, agreements and other constructive arrangements, these shall be submitted to competent bodies, including regional and international bodies, by the States or indigenous peoples concerned.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements

The progress made through this adoption at a regional body in which the US a member and participant further underscores the importance of the UN Declaration as the minimum standard in future standard setting and the need to put in place effective processes to resolve disputes over Treaty violations between the parties regionally and internationally.

## **VIII. RECOMMENDATIONS FOR THE UPCOMING UPR REVIEW AND FOR ENSURING US COMPLIANCE WITH PREVIOUS UPR RECOMMENDATIONS**

Article 43 of the UN Declaration affirms that the rights therein “constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.” Now that the Declaration has been adopted by the UN General Assembly, and supported by the US, negotiation processes between Indigenous Peoples to redress Treaty, land and other rights violations must be established. These processes must not fall below the basic, minimum standards contained in this universal human rights instrument.

**The IITC presents the following recommendations to the United States for its consideration. In our view, if implemented, they will contribute to the US’ implementation of the accepted recommendations from its 1<sup>st</sup> UPR in 2010 and will also support US compliance with its Human Rights obligations regarding the fundamental and inherent rights of Indigenous**

**Peoples, including those recognized and affirmed in the UN Declaration on the Rights of Indigenous Peoples and in Nation to Nation Treaties:**

1. That the US fully implement the UN Declaration on the Rights of Indigenous Peoples without any attempted qualifications that seek to diminish the inherent rights of Indigenous Peoples including Self-Determination and Free, Prior and Informed Consent.
2. That the US take immediate steps to establish a fair, transparent and fully participatory process to ensure that the mutual obligations established under Treaties with Indigenous Nations are fully honored, upheld and respected as an essential aspect of US' compliance with its international human rights obligations. The process must be established with the full participation of American Indian and Hawaiian Treaty Nation Parties in accordance with international human rights norms and standards, recommendations of the UN Treaty Monitoring Bodies and the provisions of the UN Declaration on the Rights of Indigenous Peoples.
3. That the US reconsider its rejection of recommendation # 204 from the first UPR review and instead commit to apply the rights affirmed in the UN Declaration on the Rights of Indigenous Peoples as a framework and guideline for interpreting and implementing their obligations under the legally binding international Conventions and Covenants, consistent with the recommendation in the February 2008 "Concluding observations of the Committee on the Elimination of Racial Discrimination" in relation to the United States that the UN "declaration be used as a guide to interpret the State party's obligations under the Convention relating to indigenous peoples" [CERD/USA/CO/6, para. 29, February 2008].
4. That the United States commit to fully implement its Treaty obligations with Indigenous Nations in keeping with its own Constitution and the UN Declaration on the Rights of Indigenous Peoples in all laws, policies, judicial proceedings and executive/administrative decisions on all levels. This includes the full and unqualified implementation of the Treaty rights to Free Prior and Informed Consent, Self-Determination in accordance with international law, and the protection of Sacred Areas, Subsistence lands and resources including inter alia the rejection of the Keystone XL Pipeline.
5. That the United States reconsider its rejection of recommendation # 154 regarding ending the incarceration of Leonard Peltier in the first UPR review, based on the continued widespread calls by Indigenous Peoples and the recommendations of Special Rapporteur on the Rights of Indigenous Peoples James Anaya after his official visit to the United States in 2012.